91-1783

No.

Supreme Court, U.S.
FILED
APR 9 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM B. SCHMIDT,
Petitioner,

v.

DEE ANN RANSONE SCHMIDT,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

WILLIAM B. SCHMIDT
10617 Moore Street
Fairfax, Virginia 22030
(703) 691-0124
Petitioner, Pro Se

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the petitioner has been denied his constitutional right to due process under the Fifth Amendment when a succession of judges and different triers of fact looked at different parts of a case, thereby creating the situation in which a final decision on the merits is made by a judge, who, by admission, was unfamiliar with all the facts that must be considered in fairness and under mandate of law.*

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* All of the parties in the Virginia Supreme Court appeal are listed in the caption.

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IN THE

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WILLIAM B. SCHMIDT,

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Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

William B. Schmidt petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinions relating to this case are unreported. The orders by the Supreme Court of Virginia denying a petition for appeal and a petition for rehearing are set forth in the Appendix to this Petition (pp. 1a, 8a). The decision of the Court of Appeals and the order denying the petition for rehearing are set forth in the Appendix (pp. 2a, 7a). The decision of the trial court is set forth in the Appendix (p. 9a).

JURISDICTION

The order of the Supreme Court of Virginia (Appendix, *infra*, p. 1a) was entered on November 13, 1991. A timely petition for rehearing was denied on January 10, 1992 (Appendix, *infra*, p. 8a).

The decision of the Court of Appeals was issued on April 30, 1991. In that decision at p. 2, the court focused on one narrow aspect of the issue and determined that "we find no merit in the husband's [petitioner's] claim that he was denied due process in violation of Code [Section] 17-116.4." In the petition for rehearing, the petitioner raised again the questions of fundamental due process and of a defective hearing in which issues of fact required to be considered by Virginia Code Sections 20-107.1 and 20-107.3 were not heard because of the court's practices. Subsequently, the Court of Appeals denied the petitioner's petition for rehearing on June 10, 1991. Consequently, in limiting its decision to one facet of the petitioner's argument, the Court of Appeals and, subsequently, the Supreme Court of Virginia, failed to deal with the fundamental due process claims of the petitioner.

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(a) because the petitioner's constitutional right to due process has been denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

2. Article I, Section 11 of the Constitution of Virginia provides:

> That no person shall be deprived of his life, liberty, or property without due process of law. . . .

STATEMENT

This case originated upon the filing of a complaint for divorce. Portions of the case were heard by four different judges and a commissioner.

A commissioner heard evidence related to the factual issues concerning the complaint for divorce and Judge

Howe Brown dealt with the exceptions to the commissioner's report. Virginia Code Section 20-107.1 requires that the court:

> . . . in determining whether to award support and maintenance for a spouse, shall consider *the circumstances and factors which contributed to the dissolution of the marriage*, specifically including adultery and *any* other ground for divorce. . . . (Emphasis added.)

Virginia Code Section 20-107.3 establishes essentially the same standard for consideration of distribution of the marital property. Nonetheless, a final decision granting a divorce and dividing the marital property was made by a Judge Thomas Kenny, who had not presided over the commissioner and the fact-finding portion of the trial that related to the circumstances and factors required to be considered by Virginia Code Sections 20-107.1 and 20-107.3. Moreover, Judge Kenny, the ultimate decision maker, acknowledged that he was unfamiliar with the record which had been made under the commissioner and Judge Brown. (Transcript, 2/23/90, p. 12)

The Court of Appeals failed to find that the petitioner's right to due process had been abridged. The Supreme Court of Virginia failed to grant a petition to deal with the due process issues raised in this case.

Petitioner, through counsel, had raised the issue of the inappropriateness of the succession of judges a number of times during the hearing. At the time that the case was assigned, petitioner's attorney noted to the clerk for the assignment judge that the case should be assigned to Judge Brown, who had presided over the fact-finding portion of the trial. (See affidavit of petitioner's attorney, App., p. 18a.) Counsel also objected at the beginning of the equitable distribution hearing before the Honorable Kenny. (Transcript, 2/23/90, pp. 11-12.) Counsel made it clear at that time and in the exceptions to the letter ruling of Judge Kenny that the petitioner's rights to due

process had been abridged. (Notice and Motion to Reconsider Ruling, 2/16/90.) In the discussion of the exceptions to Judge Kenny's letter opinion, the issue was discussed with Judge Kenny (Transcript, 2/23/90, p. 14):

> THE COURT: Okay. I understand your argument on that. And what you're saying—Y[y]ou also claim that that violated your due process?
> MR. HOTTEL: That's correct.
> THE COURT: Okay. Why?
> MR. HOTTEL: Well, I don't believe he was given a full hearing.

The court in *Commission of Fisheries v. Hampton Roads O.P. & P. Ass'n*, 109 Va. 565, 64 S.E. 1041 (1909), at p. 1048 cited in the petitioner's Opening Brief to the Court of Appeals, p. 6, relied on cases from this Court in finding that " 'due process of law' requires that a person shall have reasonable notice and opportunity to be heard. . . ." In *Ward Co. v. Henderson White Co.*, 107 Va. 626, 59 S.E. 476 (1907), (cited by the petitioner in the Opening Brief, the Court of Appeals, p. 6), the court relied on *Adkins & Co. v. City of Richmond*, 98 Va. 62, 34 S.E. 967 (1900), for the proposition that any proceeding which necessarily puts the validity of some right under the federal or state Constitution in issue is sufficient to raise the issue. Likewise, in *Cooper v. Gwinn*, 298 S.E.2d 781 (1981), (cited by the petitioner in the Petition for Appeal before the Supreme Court of Virginia, p. 8) the court found the due process issue to be grounded in fundamental principles of liberty and justice that were found in both the State and U.S. constitutions.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning whether judicial convenience can be allowed to thwart the right of Virginia litigants to a fair hearing in which the ultimate decision-maker is aware of all the facts that fairness and explicit requirements of the law dictate be considered.

The Fifth Amendment to the United States Constitution and Article I, Section II of the Constitution of Virginia establish that no person shall be deprived of life, liberty, or property without due process of law. As the Court noted in *Boddie v. Connecticut*, 401 U.S. 371 (1971) at 375, "At its core, the right to due process reflects a fundamental value in our American constitution." A vital precept of due process is the opportunity to be heard and it is "an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965) at 552. The situation in *Armstrong* is analogous to the situation at hand. In *Armstrong* a judge made a finding on the facts of an adoption and, subsequently, another judge gave the petitioner a hearing to determine whether the factual determinations made by the first judge were appropriate. This Court, in overruling that decision, found that the second hearing could not cure the lack of fundamental due process requirements for the first hearing.

This Court's concern was that the petitioner, on his appearance with the new judge, would have to overcome the adverse findings made by the former judge. The instant case presents a similar situation with respect to the relationship of the actions of two judges. Judge Brown had ruled on exceptions to the commissioner's report raised by the petitioner. Judge Kenny was unwilling to consider all of the circumstances and factors contributing to the dissolution of the marriage as required by Virignia Code Sections 20-107.1 and 20-107.3 for two reasons: (a) he was unwilling to deal with the extensive amount of material in the record and (b) he was concerned that by doing so he would be overruling a fellow judge. In this instance, Judge Brown, in his ruling on the petitioner's exceptions, was dealing with a specific issue, the legal grounds for divorce. Judge Kenny, without knowledge of all of the factors and circumstances as required by law, would go no further into the issue than the commissioner's summary and Judge Brown's determination on the exceptions. (Transcript, 5/25/89, pp. 96-97.)

In this case, it is clear that the convenience of the court was allowed to take precedence over the litigants' rights to have a full hearing of all the factual issues. Had the lower court sought to establish the practice visited upon the petitioner by rule, it would have been barred by Virginia Code Section 17-116.4.[1] Instead, the court relied on custom to do precisely what that rule prohibits. The Virginia Supreme Court in *Commission of Fisheries*, 109 Va. 565, 64 S.E. 1041, at 1049, quoted this Court in saying that any legal proceeding, "whether sanctioned by age or custom," must be held to be due process of law. As this Court has stated,

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Boddie*, 401 U.S. 371, at 377.

In the instant case, the convenience of the court in moving its docket has been allowed to override the right of the petitioner (and other litigants in the same system) to a full hearing. There is not even the semblance of pretence under the current court practice that would assure that the ultimate decision-maker is familiar with all the facts required to be considered by State statute. A situation, such as the one described here, in which the decision maker has limited or no familiarity with essential facts, cannot possibly be considered as affording the petitioner his right to a hearing in a "meaningful manner," as required by *Armstrong*.

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[1] That Section provides that no rule be promulgated:

> . . . to avoid or preclude any judge in any case who has heard any part of the case on its merits, from hearing the case to its conclusion; provided, however, another judge may hear portions of a case . . . in the event of sickness, disability or vacation of the judge. The parties to any suit, action, cause or prosecution may waive the provisions of this section. Such waiver shall be entered of record.

In summary, due process requires that a litigant be given a hearing in a meaningful manner and that evidence be presented to, and used by, the decision-maker. The practice of the Virginia courts, as evidenced by the case at hand, abrogates this standard by failing to assure that the decisions are made by a fact-finder familiar with all the facts in the case. The impact of the courts' practice goes beyond the petitioner to other litigants who must deal with the same limitation on due process imposed on them for the convenience of the court. As this Court has held, ". . . a state must afford all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the due process clause." *Boddie*, 401 U.S. 371, at 379.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM B. SCHMIDT
10617 Moore Street
Fairfax, Virginia 22030
(703) 691-0124
Petitioner, Pro Se

APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 13th day of November, 1991.

Record No. 911087
Court of Appeals No. 0703-90-4

WILLIAM B. SCHMIDT,
Appellant,

against

DEE ANN RANSONE SCHMIDT,
Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve a substantial constitutional question as a determinative issue or matters of significant precedential value, the Court dismisses for lack of jurisdiction the petition for appeal filed in the above-styled case. Code § 17-116.07(A)(3) and (B).

Justice Keenan took no part in the decision of this case.

A Copy,
Teste:

DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Cole, Keenan and Willis
Argued at Alexandria, Virginia

Record No. 0703-90-4

WILLIAM BERNARD SCHMIDT

v.

DEE ANN RANSONE SCHMIDT

From the Circuit Court of Fairfax County
Thomas S. Kenny, Judge

MEMORANDUM OPINION* BY
JUDGE BARBARA M. KEENAN
APRIL 30, 1991

William Bernard Schmidt, *pro se.*

Kaletah N. Carroll, for appellee.

In this appeal, William B. Schmidt (husband) contends that the trial court: (1) denied him due process because more than one judge heard different parts of the divorce proceedings; (2) committed error in finding that Dee Ann R. Schmidt (wife) had not deserted the marriage; (3) erred in granting the wife permanent spousal support; and (4) abused its discretion in the distribution

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* Pursuant to Code § 17-116.010 this opinion is not designated for publication.

of the marital property. The wife raises three separate issue in this appeal: (1) whether the trial court erred in finding that the husband had not deserted the marriage; (2) whether the trial court erred in failing to increase her marital award in the amount of the present day value of separate funds which she contributed to the purchase of the marital home; and (3) whether the trial court erred in denying her attorney's fees.

Upon review of the record, we affirm the decree of the trial court for the following reasons:

(1) Code § 17-116.4 does not require that a judge hearing one portion of a case hear all parts of it. Rather, it simply precludes the promulgation of any rules which would prevent a judge who has heard one part of a case from hearing all of it. The record before us contains no evidence that the Circuit Court of Fairfax County has promulgated any such rule. Therefore, we find no merit in the husband's claim that he was denied due process in violation of Code § 17-116.4.

(2) We find that the trial court did not err in finding that the wife had not deserted the marriage. Absent evidence of fraud, oppression, or frivolous grounds for filing suit, one spouse is not guilty of desertion in separating from the other spouse after institution of a suit for divorce. *Roberts v. Roberts*, 223 Va. 736, 740-41, 292 S.E.2d 370, 373 (1982). In the case before us, we find no evidence of fraud or oppression on the part of the wife. Additionally, we find that her suit against the husband was not frivolous. The trial court received evidence regarding the wife's reason for leaving, including testimony that she became physically sick due to the husband's continuing course of mental abuse, that the husband had physically abused the wife five or six times during the marriage, that the husband would totally ignore her presence in the home, that he cut off sexual relations with her in 1979, that the husband received unexplained, ongoing correspondence from another woman, that the husband

would come home very late at night at times giving no explanation of where he had been, that he would leave town and not tell her where he was going, that the husband would give the wife money for food only when she would show receipts for everything purchased. We find that the foregoing constitutes evidence that the wife's suit in this case was not frivolous. Accordingly, we find that her commencement of a suit for divorce prior to her leave-taking barred a finding of desertion. *Id.*

(3) We also find that there is sufficient evidence in the record to support the trial court's award of permanent spousal support to the wife. In addition to the evidence presented concerning the wife's income and expenses, there was also evidence that her retirement account was acquired after the separation of the parties and that she did not have access to money from it at the time of the trial court's determination. Further, we note that in order to be awarded spousal support, the wife is not required to exhaust her own estate. *Zipf v. Zipf*, 8 Va. App. 387, 398-99, 382 S.E.2d 263, 269 (1989). We find that a review of all of the evidence supports the trial court's award of spousal support to the wife. Accordingly, we find that the trial court did not abuse its discretion in its award of support. Code § 8.01-680; *Collier v. Collier*, 2 Va. App. 125, 129, 341 S.E.2d 827, 829 (1986) (citation omitted).

(4) The trial court is given broad discretion in discharging its duties under Code § 20-107.3. From the record before us, we find no evidence that the trial court abused its discretion or misapplied any of the statutory criteria. Specifically, we find no error in the trial court's use of April, 1987 as the date for classification and evaluation of the property in this case since the husband's expert employed this date in making his valuation of the property. We further find that the evidence sufficiently supports the trial court's resolution of the conflict in the equities, including the tax consequences to the parties in

making its award. Therefore, we will not disturb its award here. *Smoot v. Smoot*, 233 Va. 435, 443, 357 S.E.2d 728, 732 (1987).

(5) We find that the trial court was not plainly wrong in finding that the husband did not constructively desert the marriage. First, the husband's testimony contradicted that of the wife regarding the cessation of sexual relations. Specifically, the husband denied that he initiated the termination of the parties sexual relationship. He also denied being involved with other women and going out of town on unexplained trips. The husband further testified that the wife isolated herself from him. He testified that the reason they rarely ate together was because the wife would cook for herself, without even occasional regard for his preferences. He testified that they were further isolated due to the fact that she failed to perform other domestic duties. Finally, the husband testified that he was not miserly with the wife but was only trying to establish a budget since there were financial problems. According to the husband, these problems partially resulted from the fact that for some time, the wife had taken money from the joint account and put it in her own account. He further testified that she refused to let him see that checkbook. From this evidence, we find that that the trial court's ruling that the husband did not constructively desert the marriage was not plainly wrong or without evidence to support it. Therefore, we will not disturb its ruling on appeal. Code § 8.01-680.

(6) We find no abuse of discretion in the trial court's failure to increase the wife's marital award in the amount of the present day value of separate funds which she contributed to the marital home. As this Court stated in *Pommerenke v. Pommerenke*, 7 Va. App. 241, 249, 372 S.E2d 630, 635: "[T]he [trial] court must consider and balance all of the factors contained in Code § 20-107.3(E) in determining the amount of the monetary award. [The] cases do not mandate that, in determining the amount of

a monetary award, the court must fashion an award so as to reimburse down payments for the purchase or construction of a marital home (or other marital property)." In the case before us, the trial court, in balancing all of the statutory factors, did not elect to give the wife an increased marital award based on the present day value of the down payment. Upon review of the evidence, we do not find that this was an abuse of discretion and thus, do not disturb its award in this appeal. *Smoot*, 223 Va. at 443, 357 S.E.2d at 732.

(7) We also find no abuse of discretion in the trial court's denial of attorney's fees to the wife. An award of attorney's fees is a matter submitted to the sound discretion of the trial court upon consideration of the circumstances and equities of the entire case. *Davis v. Davis*, 8 Va. App. 12, 17, 377 S.E.2d 640, 643 (1989). Simply because the trial court has awarded spousal support does not mean that it is then required also to award attorney's fees. *Artis v. Artis*, 4 Va. App. 132, 138, 354 S.E.2d 812, 815 (1987). In the case before us, although the wife received an award of spousal support, neither she nor the husband prevailed on the grounds for divorce alleged. Under these circumstances, we find no abuse of discretion in the trial court's denial of attorney's fees to the wife.

For the reasons stated, we affirm the decision of the trial court.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 11th day of December, 1990.

Record No. 0703-90-4

Circuit Court No. CH101515

WILLIAM BERNARD SCHMIDT,
Appellant,

against

DEE ANN RANSONE SCHMIDT,
Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Fairfax County

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Upon consideration of appellant's "Motion for Leave for Additional Time to File Reply Brief," filed December 3, 1990, the said motion is denied.

A Copy,
Teste:

/s/ Patricia [Illegible]
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1992.

Record No. 911087
Court of Appeals No. 0703-90-4

WILLIAM B. SCHMIDT,
Appellant,

against

DEE ANN RANSONE SCHMIDT,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 13th day of November, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

In Chancery No. 101515

DEE ANN RANSON SCHMIDT,
Complainant,

v.

WILLIAM BERNARD SCHMIDT,
Defendant.

FINAL DECREE OF DIVORCE

THIS CAUSE came on to be heard on December 5, 1989 for entry of a Final Decree of Divorce, "equitable distribution" of the parties' marital property, a award of spousal support, the Court costs and counsel fees, all upon the pleadings heretofore filed herein, the Report of the Commissioner in Chancery to whom this cause was referred for hearing and report on the merits of the grounds for divorce, the exceptions of both parties thereto having been overruled by Order of this Court entered on October 6, 1989, the testimony of the parties and their witnesses, and the argument and Memoranda of counsel, and the Motions of both parties for reconsideration.

AND IT APPEARING TO THE COURT that the Complainant was a bona fide resident of and domiciled in the Commonwealth of Virginia at the time of the filing of this suit and had been such for more than six months next preceding the institution thereof; that the parties last cohabited as husband and wife in Fairfax County, Virginia; that both parties are over the age of eighteen years; that neither is a member of the Armed Forces of the United States; that the Defendant was served with

process in Virginia; that both parties were represented by counsel in this cause; that the Complainant's Social Security Number is 487-44-4408, her date of birth is May 21, 1940, and her present address is 10410 Armstrong Street, Fairfax, Virginia 22030; and the Defendant's Social Security Number is 150-30-4538, his date of birth is April 9, 1939, and his address is 10617 Moore Street, Fairfax, Virginia 22030; that the parties were married on the 22nd day of January 1965 in Miami, Oklahoma; that one child was born to the parties, to-wit: Bridget, born October 13, 1966; and that this cause has been regularly matured and is properly docketed for hearing and decree;

AND IT FURTHER APPEARING TO THE COURT that the parties separated on or about April 24, 1987 with the intent to be permanently separated, and they have lived separated and apart without any cohabitation and without interruption since that time and that both parties are entitled to a Divorce A VINCULO MATRIMONII from the other on the said grounds;

AND IT FURTHER APPEARING TO THE COURT, after consideration of all the factors set forth in Section 20-107.1 of the 1950 Code of Virginia as amended, that the Defendant should pay to the Complainant spousal support in the amount of $1,000.00 per month, but that neither party should be awarded counsel fees;

AND IT FURTHER APPEARING TO THE COURT that the following is the separate property of the parties:

1. Complainant's Separate Property: Complainant's pension plan which began subsequent to the parties' separation.

2. Defendant's Separate Property: Defendant's "thrift savings plan" with a balance in excess of $11,000.00.

AND IT FURTHER APPEARING TO THE COURT that there has not been any credible evidence of the value

and identity of the tangible personalty, and the Court declines to fill in the gaps.

AND IT FURTHER APPEARING TO THE COURT that the following is the pool of marital property:

1. House and lot (net of mortgage) owned as tenants by the entirety:	$214,739.00
2. Intangible Personalty:	
a. Checking accounts	2,916.00
b. IRAs	8,870.00
c. CSC stock	1,120.00
d. Savings bonds	2,000.00
	$229,645.00

e. Federal Executive Service pension in name of Defendant $78,167.00 (not to be included in the monetary calculation because the Court has determined to award the Complainant a fractional (50%) share of the marital portion of the said pension).

AND IT FURTHER APPEARING TO THE COURT pursuant to its letter ruling, dated January 12, 1990 and March 1, 1990, which are incorporated herein by reference, after consideration of all of the factors set forth in Section 20-107.3 of the 1950 Code of Virginia, as amended, as of the date of the filing of this cause, the Defendant should pay to the Complainant the sum of $1,393.00 to equalize the intangible personalty and equally divide the Commissioner's fee;

AND IT FURTHER APPEARING TO THE COURT that the Complainant should be awarded 50%, as and for her property, of the marital portion of the Defendant's United States Civil and Executive Service retirement to be paid to her at such time as the Defendant receives the said pay and that this award is a property right which shall not terminate upon the Complainant's remarriage;

AND IT FURTHER APPEARING TO THE COURT that the parties have not been able to agree to a buy-out by either party of the other's right, title and interest in

the real property located at 10617 Moore Street, Fairfax, Virginia 22030 and that a Commissioner of Sale should be appointed to sell the property, divide the proceeds in half, and the Defendant should pay to the Complainant from his half of the proceeds of sale the sum of $14,437.50 which represents one-half of the Complainant's projected tax liability as the result of her not having resided in the said realty within the last two years;

AND IT FURTHER APPEARING TO THE COURT that neither party should be awarded any attorney fees from the other;

AND IT FURTHER APPEARING TO THE COURT that all matters in both parties' Motions to reconsider are denied except that the Defendant's Motion that duration of the marriage factor should have been neutral, and the cash payment from Mr. Schmidt to Mrs. Schmidt should be $1,393.00; it is therefore,

ADJUDGED, ORDERED, and DECREED as follows:

1. That Dee Ann Ranson Schmidt and William Bernard Schmidt be and they hereby are granted a divorce A VINCULO MATRIMONII from each other on the grounds that the parties have lived separate and apart without any cohabitation and without interruption for a period in excess of one year, to-wit: since April 24, 1987, and the said marriage is hereby terminated.

2. That William Bernard Schmidt shall pay to Dee Ann Ranson Schmidt on a monthly basis the sum of one thousand dollars ($1,000.00) per month, beginning on the first day of February 1990, as and for spousal support (alimony) for Dee Ann Ranson Schmdit. The said support payments shall continue to be paid by William Bernard Schmidt on the first day of every month thereafter until the death of either party, or the remarriage of Dee Ann Ranson Schmidt, whichever first occurs.

3. Dee Ann Ranson Schmidt be and she hereby is awarded fifty percent (50%) of the gross marital portion

of the United States Civil and Executive Service Retirement (pension) of William Bernard Schmidt which was earned as the result of his employment with the United States Civil and Executive Service, the payment of the pension to Dee Ann Ranson Schmidt shall begin at such time as William Bernard Schmidt shall retire or he shall permanently terminate his employment with the United Civil or Executive Service and withdraw any of the said retirement. The said 50% of the gross marital portion shall be paid by the United States to Dee Ann Ranson Schmidt. The said 50% of the gross marital portion of the said Retirement (pension) shall be calculated, and the amount arrived at as follows: From the gross retirement pay, Dee Ann Ranson Schmidt shall receive 50% of each and every installment or lump sum paid to William Bernard Schmidt multiplied by a fraction, the numerator of which shall be the number of years the Defendant was employed and earning the pension during the marriage to April 24, 1987, and the denominator of which shall be the total years the Defendant is employed and earning the pension to the date of his retirement or until he permanently leaves the Civil or Executive Service of the United States and is paid a lump payment of his pension. The Complainant shall receive as her sole property one-half of all increases in the said retired or retainer pay that hereinafter accrues to the said marital portion of the retired pay. The Complainant's one-half of the said retired pay shall not terminate upon the remarriage of the Complainant because this award is a division of marital property between the parties. The said one-half of the said marital portion of the retired pay, plus increases, is to be paid each and every time by the United States direct to the Complainant at such time as the Defendant shall be paid any of the said retired pay. The said payment shall begin on the first day of the month following the Defendant's retirement or at such time as the Defendant shall take out any portion or all of the said retired pay in a lump sum. The Complainant shall be responsible for

payment of income tax on her half of the said marital portion of the pension, based on her total taxable income, and Defendant shall be responsible for the payment of income taxes on his half of the said marital portion of the said pension, based on his total taxable income, and each party shall hold the other harmless and indemnify the other for their respective tax liability on their portion of the said pension. The Defendant is not to be taxed on any pension monies he does not own, and the Complainant is not to be taxed on any pension money she does not own. The Complainant shall indemnify the Defendant on a yearly basis for any taxes he has to pay on her behalf. The Defendant shall indemnify the Complainant on a yearly basis for any taxes she has to pay on his behalf.

4. That William Bernard Schmidt shall forthwith pay to Dee Ann Ranson Schmidt the sum of $1,393.00 within 30 days.

5. That both parties' prayer for attorney fees be and it hereby is denied.

6. That the real property located at 10617 Moore Street, Fairfax, Virginia which is more particularly described as Moore and Oliver, Part Lot 9, Block A, Deed Book 3219, Page 399, Fairfax City Tax Map Number 57-1-((19))-(A)-9A has a fair market value as of December 5, 1989 of $225,000.00 and that it shall be sold and that Justus M. Holme, Jr. be and he hereby is appointed Commissioner of Sale to solicit bids for the sale of the said real estate by advertising the property as he sees fit or to engage the services of a broker and to list the said property with the multiple listing service of the Northern Virginia Board of Realtors, and to do what is necessary to expedite a fair sale of the subject property with all deliberate speed, subject to the approval of this Court, and the said Commissioner shall give bond with corporate surety in the amount of $225,000, and upon the settlement of the sale of the said realty, to divide the net proceeds of sale into two equal parts, one-half being the

property of the Complainant, and one-half being the property of the Defendant, and if the property is sold to a third party, $14,437.50 shall be subtracted from the part belonging to the Defendant, and the said $14,437.50 paid to the Complainant, and the Court specifically reserves the right to supervise, approve and sell the said realty and do all things necessary to carry out the sale of the said realty in accordance with Section 8-01-81 et. seq. of the 1950 Code of Virginia as amended subsequent to the entry of this Decree.

7. And, in the event the said realty is not sold within 180 days of the entry of this Decree, either party may petition the Court for a contribution for the mortgage, taxes, insurance, repairs, maintenance and utilities and for rent on the said premises, and the Court specifically reserves the right to hear and adjudicate these matters subsequent to the entry of this Decree.

8. That the injunction entered on April 14, 1989 restraining the Defendant from removing any of the funds from the Thrift Savings Plan be and it hereby is dissolved.

9. Pursuant to Section 20-60.3 of the 1950 Code of Virginia:

(1) That the Defendant, William Bernard Schmidt, is hereby notified that support payments may be withheld as they become due pursuant to Section 20-79.1 or Section 20-79.2 of the 1950 Code of Virginia, amended, from earning as defined in Section 63.1-250, without further amendments of this Order or having to file an application for services with the Department of Social Services.

(a) Defendant is also notified that support payments may be withheld pursuant to Chapter 13 (Section 16.1-249 et. seq.) of Title 63.1 of the Virginia Code without further amendments to this Order upon application for services with the Department of Social Services.

(2) There are no minor children involved.

(3) The name of the party obligated to pay spousal support is William Bernard Schmidt, Social Security Number 150-30-4538, his birth date is April 9, 1939, he presently resides at 10617 Moore Street, Fairfax, Virginia 22030, and he is employed by the United States Bureau of Mines in Washington, D.C.

(4) The amount of periodic payments due, and the beginning date and the payment intervals are set forth as follows: That the Defendant shall pay to the Complainant the sum of one thousand dollars ($1,000.00) per month beginning on the first day of February 1990, and shall continue to be paid on the first day of each month thereafter until the death of either party or the remarriage of the Complainant, whichever comes first.

(5) There is no provision for health care coverage for the Complainant or Defendant.

(6) Spousal support owed to Dee Ann Ranson Schmidt is presently in arrears in the amount of $500.00 for the payment due March 1, 1990, all payments made by the Defendant are to be applied to current obligations first and any payment in excess of the current obligations shall be applied to any arrearage.

(7) Not applicable.

(8) Defendant is further notified that in determination of a support obligation, the support obligation as it becomes due and unpaid creates a judgment by operation of law.

AND THIS DECREE IS FINAL.

ENTERED: April 6, 1990.

/s/ Thomas Kenny
JUDGE THOMAS S. KENNY

Seen and Excepted to:

/s/ Kaletah N. Carroll
KALETAH N. CARROLL
Counsel for Complainant

Seen and Excepted to:

_____

DENNIS M. HOTTELL
Counsel for Defendant

VIRGINIA:

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

In Chancery No. 101515

DEE ANN RANSONE SCHMIDT,
Complainant,

v.

WILLIAM BERNARD SCHMIDT,
Defendant.

AFFIDAVIT OF DENNIS M. HOTTELL

Personally appeared before me Dennis M. Hottell who, being first duly sworn, states as follows:

1. That as counsel of record for the defendant, William B. Schmidt, at the trial in this matter before the Fairfax Circuit Court, on Tuesday, December 5, 1989 (the day before the first day of the trial on the merits of this case) I spoke to Ms. Mary Mathalon of the Fairfax Circuit Court Clerk's office (whose duties include the coordinating of time estimates for trials and communicating this information and any other relevant information regarding logistics and scheduling of trials between counsel and the Chief Judge of Fairfax Circuit Court). I advised Ms. Mathalon of my time estimate of the case, what the issues were that the court would be asked to decide and finally, I advised Ms. Mathalon that the exceptions to the commissioner's report had been argued before J. Howe Brown of the Fairfax Circuit Court and Judge Brown had reviewed the entire commissioner's hearing transcript (which involved 2 full days and 2 pretrial days of testimony). I requested that Ms. Mathalon convey this information to the Chief Judge of the Fairfax

Circuit Court along with the request that, in my opinion, the case should be scheduled before Judge Brown.

/s/ Dennis M. Hottell
DENNIS M. HOTTELL

STATE OF VIRGINIA,

COUNTY OF ARLINGTON, SS;

The foregoing Affidavit was subscribed and sworn to before me this 27th day of June, 1990 by Dennis M. Hottell.

/s/ Maryann T. Craig
Notary Public

My Commission Expires: April 22, 1991